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09/890,486	12/28/2001	Wilhelmus Johannes Everardus Van Den Dungen	3135-011126	1769

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EXAMINER

BECKER, DREW E

ART UNIT	PAPER NUMBER
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1761

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/890,486
Filing Date: December 28, 2001
Appellant(s): VAN DEN DUNGEN ET AL.

Timothy J. Zarley
For Appellant

EXAMINER'S ANSWER

MAILED

JUL 26 2004

GROUP 1700

This is in response to the appeal brief filed June 4, 2004.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

This appeal involves claims 47-57.

Claims 31-46 have been withdrawn from consideration as not directed to the elected group.

(4) *Status of Amendments After Final*

No amendment after final has been filed.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) Issues

The appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

Appellant's brief includes a statement that claims 47-57 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

WO 93/12660	Morgan et al	7-1993
WO 99/13729	Van de Dungen	3-1999
3,551,535	Henderson et al	12-1970
6,054,155	Kobussen et al	4-2000

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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2. Claim 57 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

3. Claim 57 provides for the use of "dry collagen", but, since the claim does not set forth any steps involved in the method/process, it is unclear what method/process applicant is intending to encompass. A claim is indefinite where it merely recites a use without any active, positive steps delimiting how this use is actually practiced.

Furthermore, "dry collagen" is already recited in parent claim 49.

Claim 57 is rejected under 35 U.S.C. 101 because the claimed recitation of a use, without setting forth any steps involved in the process, results in an improper definition of a process, i.e., results in a claim which is not a proper process claim under 35 U.S.C. 101. See for example *Ex parte Dunki*, 153 USPQ 678 (Bd.App. 1967) and *Clinical Products, Ltd. v. Brenner*, 255 F. Supp. 131, 149 USPQ 475 (D.D.C. 1966).

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 47-48 and 52-55 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 99/13729 in view of WO 93/12660.

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WO 99/13729 teaches a method of making sausages by co-extruding meat and a casing (page 11, lines 32-38), separating the sausage string into separate units (page 12, line 5), subjecting the units to a treatment with liquid smoke (page 12, line 36) which was a known coagulant, and then drying and further coagulating the sausage (page 13, line 9). WO 99/13729 does not recite the composition of the casing, in particular it being 8-10% collagen (claims 47 & 52-54), and a pre-coagulation treatment prior to separation (claim 48). WO 93/12660 teaches a method of making sausage by co-extruding meat and collagen (page 3, lines 3-5), the use of 4-10% collagen (page 6, line 4), and coagulation with liquid smoke prior to separation (page 3, line 12 to page 5, line 14). It would have been obvious to one of ordinary skill in the art to incorporate the collagen and pre-coagulation treatment of WO 93/12660 into the invention of WO 99/13729 since both are directed to sausage making, since WO 99/13729 already included co-extrusion (page 11, lines 32-38) and coagulation with liquid smoke (page 12, line 36; page 13, line 9), since collagen was a commonly co-extruded material for sausage casings as shown by WO 93/12660 (page 3, line 3), since WO 93/12660 teaches that liquid smoke was a known coagulant and provided cross-linking (page 4, lines 14-26), and since the pre-treatment of WO 93/12660 would have further strengthened the sausage of WO 99/13729 and thus prevented possible damages during processing (page 1, line 12 to page 2, line 12).

6. Claims 49-51 and 57 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 99/13729, in view of WO 93/12660, as applied above, and further in view of Henderson et al [Pat. No. 3,551,535].

WO 99/13729 and WO 93/12660 teach the above mentioned concepts. WO 99/13729 and WO 93/12660 do not teach the use of dry, fibrous collagen. Henderson et al teach a method of making sausage skins by use of dry, fibrous collagen (column 6, Example I). It would have been obvious to one of ordinary skill in the art to incorporate the dry, fibrous collagen of Henderson et al into the invention of WO 99/13729, in view of WO 93/12660, since all are directed to sausage making, since WO 99/13729 already included co-extrusion of a skin (page 11, lines 32-38), since WO 93/12660 already included co-extrusion of collagen with additives such as coagulants and cross-linking agents (page 3, line 1 to page 5, line 15), and since the dry collagen of Henderson et al prevented air pockets and provided improved homogenization as compared to conventional collagen skins (column 1, lines 30-73).

7. Claim 56 is rejected under 35 U.S.C. 103(a) as being unpatentable over WO 99/13729, in view of WO 93/12660, as applied above, and further in view of Kobussen et al [Pat. No. 6,054,155].

WO 99/13729 and WO 93/12660 teach the above mentioned concepts. WO 99/13729 and WO 93/12660 do not teach the use of dipotassium phosphate. Kobussen et al teach a method of making sausage by using dipotassium phosphate as a coagulant (column 3, line 20). It would have been obvious to one of ordinary skill in the art to incorporate the dipotassium phosphate of Kobussen et al into the invention of WO 99/13729, in view of WO 93/12660, since all are directed to sausage making, since WO 99/13729 already included coagulation with liquid smoke (page 12, line 360, and since

dipotassium phosphate was a commonly used coagulant in sausage making as shown by Kobussen et al.

(11) Response to Argument

Appellant argues that WO 99/13279 does not teach coagulation and that the liquid smoke only provided taste. However, WO 99/13279 clearly teach coagulation by applying liquid smoke, followed by drying (page 12, line 36; page 13, line 9).

Furthermore, WO 93/12660 teaches that liquid smoke was a known coagulation agent which also provided cross-linking (page 3, lines 14-26). In addition, liquid smoke was listed by appellant as a preferred coagulation agent (claim 55).

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the

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references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, WO 99/13729 teaches a method of producing sausage links, while WO 93/12660 teaches a method of making sausage links which undergo a coagulation treatment prior to separating the links which thus strengthens the links and prevents rupture during processing (page 1, line 12 to page 2, line 12).

Appellant argues that since WO 99/13279 did not explicitly contain the teachings of the earlier published WO 93/12660, they cannot be combined. However, an inventor should not, and is not, required to provide every possible use or modification of their invention. This is the basis for obviousness rejections.

In response to applicant's argument based upon the age of the references, contentions that the reference patents are old are not impressive absent a showing that the art tried and failed to solve the same problem notwithstanding its presumed knowledge of the references. See *In re Wright*, 569 F.2d 1124, 193 USPQ 332 (CCPA 1977).

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Appellant argues that WO 99/13279 does not teach coagulation and that the liquid smoke only provided taste. However, WO 99/13279 clearly coagulation by applying liquid smoke, followed by drying (page 12, line 36; page 13, line 9). Furthermore, WO 93/12660 teaches that liquid smoke was a known coagulation agent which also provided cross-linking (page 3, lines 14-26). In addition, liquid smoke was listed by appellant as a preferred coagulation agent (claim 55).

Regarding the 112(2) rejection of claim 57, appellant argues that the claim is definite. However, claim 57 merely recites "the use of dry collagen". It is not clear what this use is, or how it is used in the claimed method. Furthermore, dry collagen was already present in parent claim 49.


For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



Drew E. Becker
Primary Examiner
Art Unit 1761

July 22, 2004

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